NO. 86-1345

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1986

CIPRIANO A. ARAGON,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari
to the Court of Appeal of the
State of California
Fourth Appellate District

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the rule of law concerning the admissibility of evidence that third parties committed the crime for which an accused is charged, as announced by the California Supreme Court in People v. Hall (1986) 41 Cal.3d 826 prevents an accused from presenting a defense at trial in violation of the guarantees to a fair trial and due process as set forth in the Sixteenth and Fourteenth Amendments to the United States Constitution.

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OPINION BELOW

The California Court of Appeal, Fourth Appellate District, Division Three, received petitioner's direct appeal from a judgment of conviction. In an unpublished opinion, the court affirmed petitioner's conviction. (Petn., App. A.)

JURISDICTION

This Court has jurisdiction to consider this case pursuant to 28 U.S.C. 1257, subdivision 3.

STATUTES INVOLVED

The applicable statutes involved are set forth in Appendix A.

STATEMENT OF THE CASE

After being charged with lewd and lascivious acts on a child under the age of 14 (Pen. Code, § 288, subd. (a)(b)) and sexual penetration of the victim by force with a foreign object (Pen. Code, § 289, subd. (a)) petitioner's first trial was declared a mistrial after the jury announced it was deadlocked. (Petn., App. A.)

A second trial resulted in petitioner being found guilty of one count of child molestation (Pen. Code, § 288 (a)), and of causing great bodily injury to the victim in violation of

Penal Code section 1203.066, subdivision (a)(2). (Petn., App. A.)

Petitioner's motion for a new trial was denied, after which he was sentenced to the state prison for three years.

In an unpublished opinion filed July 31, 1986, the California Court of Appeal, Fourth Appellate District, Division Three affirmed petitioner's conviction. (Petn., App. A.)

The California Supreme Court declined to consider petitioner's case on appeal. (App. B.)

STATEMENT OF FACTS

The facts are adequately set forth in the opinion of the Court of Appeal, Fourth Appellate District, Division Three and are as follows:

> "Seven-year-old Victoria O., her five-year-old brother Efrain and another five-year-old boy, Mauricio, went with Aragon to the company where he

worked. The business was closed but Aragon had a key. Efrain and Mauricio waited in the car with the radio on while Aragon and Victoria went inside. Aragon lifted Victoria onto a table, pulled down her panties and stuck his finger into her vagina. She cried and hit him. He slapped her and warned her not to tell anyone. Efrain noticed Victoria was rubbing her eyes when she and Aragon returned to the car. Aragon then took all of the children to a convenience store for ice cream.

"Victoria initially remained silent about the incident. The next morning her mother discovered blood stains in the little girl's panties. Victoria explained it was caused by a Popsicle. A medical examination disclosed recent vaginal tears and a torn hymen, which the doctor believed were the result of abuse. The injuries were consistent with the insertion of a finger or some other foreign object. After a nurse urged Victoria to tell the truth, she described what Aragon had done the night before. She repeated this to her mother and later the police.

"At Aragon's first trial, Victoria's uncle, Felipe Ramirez, was called as a

defense witness in an attempt to show he could have been the perpetrator. Ramirez admitted living in the same house with Aragon, Victoria and her family, and a number of other adults at the time of the incident. He also testified he moved to Chicago three weeks after Aragon was arrested. Ramirez admitted being home alone with the children during the afternoon of the day in question, before the other residents arrived home from work. He later left the house and was gone for about two hours, until nine o'clock. Although he denied molesting Victoria, he did admit to punishing the children previously by putting them in the garage with the lights out.

"The first jury was unable to reach a verdict and a mistrial was declared. The second trial began with the prosecutor's motion to preclude defense counsel from suggesting Ramirez was the perpetrator without first conducting a hearing to determine the admissibility of any such evidence. The court granted this request and defense counsel sought a clarification of the ruling to determine whether she was precluded from calling Ramirez as a witness. She made an offer of proof regarding proposed testimony to show Ramirez, not Aragon, might

have molested Victoria. That offer included Ramirez's testimony from the first trial. She also proffered evidence Ramirez might have molested Victoria that evening at the house, when someone else heard the children crying. According to the offer of proof, Ramirez had in the past laid his head in the victim's lap and had asked Victoria to bring him a towel when he was nude. In response to the prosecution's motion, a trial judge clearly stated counsel could not call Ramirez as a witness. After further discussions the next day, however, that ruling was apparently reversed. The judge stated the defense could call any witness; he would rule on any objections as they arose." (Petn., App. A.)[1]

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1. Despite the ambiguities in the record, as well as defense counsel's failure to attempt to call any witnesses who could shed light on the ultimate issue raised herein, the Court of Appeal concluded petitioner had adequately preserved the question of the trial court's ruling for appeal.

ARGUMENT

THE EXCLUSION OF EVIDENCE THAT A THIRD PARTY COMMITTED THE CRIME FOR WHICH PETITIONER WAS CONVICTED WAS EVALUATED IN ACCORDANCE WITH PEOPLE V. HALL (1986) 41 CAL.3D 826, A DECISION FULLY COMPORTING WITH THE EXPRESSIONS OF THIS COURT AND THE OTHER STATE COURTS CITED BY PETITIONER; ACCORDINGLY, THERE WAS NO VIOLATION OF THE PROTECTIONS AFFORDED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner contends his rights to a fair trial and to due process, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, were abrogated by the Court of Appeal's affirmance of the trial court's ruling preventing the introduction of evidence designed to demonstrate the victim's uncle was the perpetrator of the offense. In concluding the California standard for determining the admissibility of such evidence runs afoul of constitutional

protections, however, petitioner has misplaced his emphasis.

Under the guise of presenting an historical background, petitioner relies on the anachronistic expressions of law in the cases of: People v. Mendez (1924) 193 Cal. 39; People v. Arline (1970) 13 Cal.App.3d 200; People v. Perry (1980) 104 Cal.App.3d 268; and People v. Green (1980) 27 Cal.3d 1. Each of these cases was expressly disapproved by the California Supreme Court in People v. Hall (1986) 41 Cal.3d 826. The standard announced in Hall was the very standard by which the Court of Appeal evaluated the trial court's ruling. Because the expression of law in Hall comports with the very authorities cited by petitioner, respondent submits there was no violation of the constitutional protections afforded by the Sixth and Fourteenth Amendments to the United States

Constitution, and, hence, absolutely no reason exists for this Court to grant the requested writ of certiorari.

The Holding of People v. Hall (1986) 41 Cal.3d 826

In People v. Hall, supra, the California Supreme Court had occasion to examine and, ultimately, reconstruct the so-called Mendez-Arline rule of law concerning the admissibility of evidence designed to demonstrate someone other than the accused committed the crime. Under the Mendez-Arline test, such evidence was admissible only when the trial court could conclude such evidence showed a "substantial probability" of third-party guilt.

Analyzing the introduction of such evidence in the context of California Evidence Code sections 350 and 352 (see App. A), the Hall court rejected this reasoning. Instead, a new rule was

fashioned in which "courts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible (Evid. Code, § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion. (Evid. Code, § 352.)" (People v. Hall, supra, 41 Cal.3d at p. 834.)

The establishment of an easier standard of admissibility, however, did not mean such evidence would be admissible carte blanche. Despite appellant Hall's reference to a number of out-of-state decisions "ostensibly supporting his constitutional argument" (Id., at p. 835), the court concluded not one suggested that third party culpability evidence must be admitted no matter how remotely relevant and without considering its potential to disrupt orderly proceedings." (Ibid.)

In this regard, California's highest court referred to this Court's decision in Alexander v. United States (1891) 138 U.S. 353. While noting that decision only excluded third party culpability evidence having 'no legitimate tendency' to exculpate a defendant, the court further acknowledged all such evidence is initially screened under the Federal Rules of Evidence, rule 403, "the counterpart of our section 352." (People v. Hall, supra, 41 Cal.3d at p. 835.)

Thus, the rule of law concerning the admissibility of third party culpability evidence was structured in California in conformity with the federal standard.

The Court of Appeal's Application of Hall

Although People v. Hall, supra, was decided during the pendency of

petitioner's appeal, the Court of Appeal applied the Hall standard in reviewing the trial court's decision. The Court of Appeal noted that under Hall the standard was whether the third party evidence was "capable of raising a reasonable doubt of defendant's guilt." (Petn., App. A.)

The court thereafter analyzed the nature of the evidence concerning the third party, Ramirez. While finding the evidence offered suggested Ramirez had an opportunity to commit the crime, it would not have been at the same place described by the victim. Moreover, "[the victim's] version was corroborated by her brother who testified Victoria was rubbing her eyes when she returned to the car with Aragon." (Petn., App. A.) Finding the proffered evidence offered no "direct or circumstantial" link between Ramirez and the commission of the crime, the court concluded the evidence was irrelevant

and, therefore, inadmissible under Hall."2/

Petitioner's Authorities

Petitioner has cited a number of cases in support of his argument the exclusion of the third party evidence herein was constitutionally impermissible. As will be demonstrated, however, the context of those other cases was such as to distinguish it from the instant case.

A. Crane v. Kentucky (1986) 476 U.S. ____, 90 L.Ed.2d 636

In Crane, this Court was faced with the situation in which a defendant had been precluded from presenting to the jury the circumstances in which his confession had been obtained, following

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2. The court also noted defense counsel failed to present the issue of Ramirez's demeanor to the trial court "though invited to do so in a hearing outside the presence of the jury." (Petn., App. A, p. 7.)

the trial court's concluding the confession was voluntary. It was defendant's position a demonstration of the coercive environment in which the statement was made, together with its inherent inconsistencies, would have weighed heavily in the jury's ability to evaluate the statement as credible. This Court agreed.

The probative weight to be given such a statement, particularly when it represented the bulk of the prosecution's case, was "a matter that is exclusively for the jury to assess." (Crane v. Kentucky, supra, 476 U.S.____ , 90 L.Ed.2d at p. 644.) This Court cautioned, however, its decision did not signal "any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures . . ." (Id., at p. 644-645;

citing Chambers v. Mississippi (1973) 410 U.S. 284, 302-303.) Nonetheless, the blanket preclusion of the offered evidence was found to have deprived petitioner of a fair trial.

In the instant case, the prosecution's evidence consisted of a direct statement by the victim as to the identity of the perpetrator, as well as the nature and location of the acts inflicted on her. While no one else was present at the time the molestation occurred, the victim's brother did corroborate the victim's demeanor at the time and location stated by the victim. The evidence against Ramirez, on the other hand, was pure speculation founded on past behavior. While there was testimony at the first trial the victim and her brother were crying later on the night in question, there was no evidence

to suggest a molestation occurred at that time.

Further, while the Court of Appeal found counsel had preserved the issue of the admissibility of the evidence for appeal, there was no attempt, as the court indicated, to have the trial court view the demeanor of Ramirez in determining whether such a factor could have affected the jury's evaluation of the credibility of the statements by the victim and her brother.

B. State v. Hawkins (1977) 260 N.W. 150

In Hawkins the defendant was prevented at trial from presenting evidence against the very prosecution witness who had testified against him. Defendant had been charged with the murder of an acquaintance with whom defendant and the prosecution witness, Czuchry, had been drinking. Hawkins

attempted to introduce evidence that Czuchry became hostile and aggressive when drinking. An offer of proof was also made that when Czuchry drank he would be subject to blackouts and lapses of memory. It was further shown the defendant had overheard Czuchry and the deceased discussing the possession of stolen weapons. Thus, the central point of Hawkins defense was that Czuchry had committed the murder. (State v. Hawkins, supra, 260 N.W. 157-158.)

In evaluating the propriety of excluding such evidence, the Minnesota Supreme Court stated the rule as follows:

> "'The rule is that [evidence of such acts] by a third person against the victim may not be shown unless coupled with other evidence having an inherent tendency to connect such other person with the actual commission of the crime.' [Citations omitted.] That is, evidence tending to incriminate another is inadmissible in the absence of proof of facts to connect that

> person with the crime. This requirement avoids the use of bare suspicion and safeguards the third person from indiscriminate use of past differences with the deceased." (State v. Hawkins, supra, 260 N.W. 159; emphasis added.)

Finding Czuchry's own testimony had "connected him to the crime" (Id., at p. 160), the court found the evidence of illegal dealings between the witness and the deceased could have provided a motive for the killing, while the collateral acts of violence by the witness could be relevant to the determination whether he committed the crime. (Ibid.)

No such circumstances appear in the instant case. The victim of the crime herein unequivocally identified the petitioner as the perpetrator. To a large degree, the victim's statements were corroborated by her brother. Certainly, the evidence offered against Ramirez in no manner connected him with

the "actual commission of the crime" and, indeed, was based on the very "mere suspicion" and past conduct between the third party and the victim condemned by the Minnesota court.

The standard in Hawkins, moreover, would appear to place a greater burden on the proponent of the third party culpability evidence than that announced in People v. Hall, supra. While Hawkins speaks of the evidence having an inherent tendency to connect the third party with the actual commission of the crime, the Court of Appeal, echoing the sentiments of Hall, evaluated the evidence as having any capability of raising a reasonable doubt of petitioner's guilt. In Hawkins, the evidence was relevant because it related directly to a witness who testified against the accused. In the instant case, the evidence was not relevant as

failing to satisfy either the Hawkins or the Hall tests.

C. State v. LeClair (1981) 425 A.2d 182

The defendant in LeClair was convicted of arson. At trial, he documented a number of other, similar fires which had occurred and attempted to show another person was the arsonist. The trial court compounded the evidentiary issue by admitting as evidence certain information regarding the other fires and disallowing others. These rulings created the potentiality the defendant had been involved in other fires than the one for which he was being tried. (Id., at p. 187.) Given this possible consequence, the Maine Superior Court vacated the conviction. (Ibid.)

In so ruling, the court declared, "In appropriate circumstances, a defendant should be allowed to

introduce evidence to show that another person committed the crime or had the motive, intent, and opportunity to commit it." (State v. LeClair, supra, 425 A.2d 187.)

The evidence offered by petitioner in the instant case does not nearly approach the quantum produced in LeClair. (See People v. Leclair, supra, 425 A.2d at pp. 185-186.) Again, petitioner's evidence consisted only of placing Ramirez with the victim at a point in time later than the victim testified, testimony the victim and her brother were heard crying later on that evening, and the past actions of Ramirez towards the victim, none of which involve molestation. The distinction between the LeClair case, therefore, and petitioner's is obvious.

D. State v. Denny (1984) 357 N.W.2d 12

In this Wisconsin Court of Appeals decision, defendant was convicted of first degree murder. One of his contentions on appeal challenged the trial court's refusal to admit evidence that any number of other people had the motive and opportunity to kill the victim.

In affirming Denny's conviction, the Wisconsin Court adopted the legitimate tendency test espoused by this Court in Alexander v. United States, supra, 138 U.S. 353. In so doing, the former California rule in People v. Green, supra, 27 Cal.3d 1, in which substantial evidence was required, was rejected. The rule ultimately adopted by Wisconsin, and under which Denny's offer of proof was found deficient, bears a remarkable resemblance, however, to the

rule announced in Hall under which petitioner's similar offer was refused.

The Denny court found the legitimate tendency test did not require evidence worthy of establishing the guilt of the third party to the same extent necessary to sustain a conviction of the accused. By the same token, " . . . evidence that simply affords a possible ground of suspicion against another person should not be admissible." (State v. Denny, supra, 357 N.W.2d at p. 17; emphasis added.) Such a definition was required in order to prevent the trial from becoming into one in which evidence could be forthcoming showing "hundreds of other persons had some motive or animus against the deceased--degenerating the proceedings into a trial of collateral issues." (Ibid.) Thus, before such third party evidence would be admissible, it had to demonstrate a motive and

opportunity to commit the crime, and establish a direct connection between the crime and third person which was not remote in time, place or circumstance. (State v. Denny, supra, 357 N.W.2d at p. 17.)

Rather than supporting petitioner's position, the Denny decision supports respondent's conclusion the rule of law in California--the Hall case--is in total conformity with constitutional guarantees. Petitioner's characterization of the evidence about Ramirez notwithstanding, it is clear that evidence did not demonstrate any of the prerequisites in Denny. Despite the reference to Ramirez having placed his head on the victim's lap in the past, and having asked for a towel while in the shower in the past, there was no inkling he had ever molested the victim. Thus, there was no motive.

While petitioner suggests Ramirez and the children were alone later that night, there is no suggestion the victim was ever separated from her brother. Thus, there was no opportunity to commit the crime, unless it was committed in the presence of the victim's brother.

In light of the victim's unequivocal identification of petitioner as the perpetrator, and the testimony of the victim's brother which corroborated the time and place of the alleged assault, petitioner's offer of proof did not create a direct connection between Ramirez and the crime, and was remote in time, place and circumstance.

Conclusion

The tenor of petitioner's argument creates the impression any evidence of third party culpability is admissible. As the very authorities

prerequisites. The basis upon which that decision was made--People v. Hall, supra --was in total conformity with the protections afforded by the Sixth and Fourteenth Amendments to the United States Constitution.

* * * * *

CONCLUSION

For the foregoing reasons, respondent respectfully requests the petition for writ of certiorari be denied.

Respectfully submitted,

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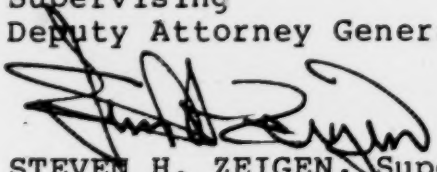

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A P P E N D I X A

APPENDIX A

Evidence Code Section 350.

Only relevant evidence admissible.

"No evidence is admissible except relevant evidence."

Evidence Code Section 352.

Discretion of court to exclude evidence.

"The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

A P P E N D I X B

O R D E R D E N Y I N G R E V I E W

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 3, No. G002929

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

I N B A N K

PEOPLE

v.

CIPRIANO ALFARO ARAGON

Appellant's petition for review DENIED.

BIRD
Chief Justice

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

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No: 86-1345
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CIPRIANO A. ARAGON,

Petitioner,

v.

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within BRIEF OF RESPONDENT IN OPPOSITION as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 40 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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For Delivery to:
Hon. John H. Smith, Jr.

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 13 day of May, 1987.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, May 13, 1987.

Clifford E. Reed

CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 13th day of May, 1987.

Vida M. Allen

Notary Public in and for said County and State

VIDA M. ALLEN
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1990